

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Roger Sween,

Complainant,  
vs.

DISMISSAL  
ORDER

Tim Kelly, Kelly for House, and P.  
Hanson Marketing, Inc.,

Respondents.

This matter came on for a probable cause hearing under Minnesota Statutes § 211B.34, before Administrative Law Judge Kathleen D. Sheehy on October 24, 2008, to consider complaints filed by Roger Sween on October 17, 2008, against Tim Kelly, Kelly for House, and P. Hanson Marketing, Inc. The complaints were consolidated by order dated October 23, 2008. The probable cause hearing was conducted by telephone conference call. The record closed at the conclusion of the probable cause hearing on October 24, 2008.

Allan W. Weinblatt, Weinblatt & Gaylord, PLC, 111 East Kellogg Boulevard, Suite 300, St. Paul, MN 55101, appeared for Roger Sween (Complainant). Mr. Sween did not participate in the hearing.

Reid LeBeau, Lockridge, Grindal, and Nauen, PLLP, 100 Washington Avenue South, Suite 2200, Minneapolis, MN 55401, appeared for Respondents Tim Kelly, Kelly for House, and P. Hanson Marketing, Inc. (PHMI).

Based on the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge finds that there is not probable cause to believe that the Respondents violated Minn. Stat. § 211B.13 or 211B.15 (2006).

**ORDER**

**IT IS HEREBY ORDERED:** that there is not probable cause to believe that the Respondents have violated Minn. Stat. §§ 211B.15 or 211B.13, and therefore the Complaints in this matter are DISMISSED. The Respondents' request for attorney's fees is DENIED.

Dated: October 28, 2008

s/Kathleen D. Sheehy

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KATHLEEN D. SHEEHY  
Administrative Law Judge

Digitally recorded (no transcript prepared).

### **NOTICE OF RECONSIDERATION AND APPEAL RIGHTS**

Minnesota Statutes § 211B.34, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minnesota Statutes § 211B.35 within five business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

### **MEMORANDUM**

Respondent Tim Kelly is a candidate for Minnesota House of Representatives District 28A. Respondent Kelly for House is Kelly's registered campaign committee. PHMI is a for-profit corporation located in Cannon Falls, Minnesota. It publishes a magazine, *Generations of Today (Today)* and a newspaper called *The Ag Reporter (Reporter)*, both of which are widely distributed in District 28A.<sup>1</sup>

The Complaints allege that PHMI published, free of charge, a five-page advertisement for Respondent Kelly's campaign in the September 2008 issue of *Today*.<sup>2</sup> The five-page item consists of a photograph of Tim Kelly and his parents on the cover of the publication, with the headline: "Politically Speaking/Mike & Nancy Kelly's family was raised in Public Service." At pages 33-36, an article by Leon Hanson is captioned "The Campaign Trail/Tim Kelly's political path driven by family values." The gist of the story is that Kelly's parents, who are Democrats, have raised their large family to be involved in public service and were surprised yet supportive when their son Tim decided to run for the state legislature as a Republican. Included in the publication are various photographs of Mike and Nancy Kelly and their children and grandchildren, including one photograph of Tim Kelly and his family that also appears on Kelly's website and

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<sup>1</sup> Complaint in 3-0320-19985-CV (against PHMI); Complaint in 3-0320-19986-CV (against Kelly and Kelly for House).

<sup>2</sup> Complainant's Ex. 1.

in his campaign material.<sup>3</sup> The Complaints also allege that PHMI published, free of charge, a one-page advertisement for Respondent Kelly's campaign in the October/November issue of the *Reporter*.<sup>4</sup>

The Complaints allege that in publishing these advertisements without charge, PHMI violated the prohibition against corporate contributions contained in Minn. Stat. § 211B.15, and that by knowingly accepting or by aiding, abetting, or advising this prohibited contribution, Respondents Tim Kelly and Kelly for House violated Minn. Stat. §§ 211B.13, subd. 2, and 211B.15, subd. 13.

The Complainant did not appear at the probable cause hearing except through counsel. The Complainant elected to rely on the Complaints and the attachments thereto in support of a probable cause determination. The Respondents appeared and offered evidence that the one-page advertisement in the October/November issue of the *Reporter*<sup>5</sup> was a paid advertisement. The Respondents produced an invoice dated October 1, 2008, billing Tim Kelly for this and other advertisements published in the *Reporter* and *Today*, along with evidence that Kelly paid for the advertising by check dated October 14, 2008.<sup>6</sup> The Respondent also argued that the five-page "advertisement" published in the September 2008 issue of *Today* was a feature news article that is exempt from being considered a contribution under Minn. Stat. § 211B.15, subd. 5.

Minn. Stat. § 211B.15, subd. 2, prohibits corporations from making contributions, directly or indirectly, to an individual to promote the individual's candidacy or election to political office. Individuals are precluded from aiding, abetting, or advising a violation of this section by Minn. Stat. § 211B.15, subd. 13. This section does not, however, prohibit publication or broadcasting of news items or editorial comments by the news media.<sup>7</sup> Minn. Stat. § 211B.13, subd. 2, prohibits a person from knowingly soliciting, receiving, or accepting money or anything of monetary value that is a prohibited corporate disbursement under section 211B.15.

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.<sup>8</sup> The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.<sup>9</sup> The purpose of a probable cause determination is to answer the question whether, given the facts disclosed by the record, it is fair and reasonable to require the respondent

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<sup>3</sup> *Id.*

<sup>4</sup> Complainant's Ex. 2.

<sup>5</sup> *Id.*

<sup>6</sup> Respondent's Exs. 1 and 2.

<sup>7</sup> Minn. Stat. § 211B.15, subd. 5.

<sup>8</sup> Minn. Stat. § 211B.34, subd. 2.

<sup>9</sup> 239 N.W.2d 892 (Minn. 1976); see also Black's Law Dictionary 1219 (7<sup>th</sup> ed. 1999) (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime.")

to go to hearing on the merits.<sup>10</sup> If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict of acquittal, a motion to dismiss for lack of probable cause should be denied.

### ***Media Exemption***

The Complainant contends that the question whether the five-page article is a news story or an advertisement that should properly be considered a contribution is a fact question that cannot be resolved at the probable cause stage. Respondent PHMI argues that this is a legal issue that must be resolved at the probable cause stage to protect the media's First Amendment right to exercise editorial control over the content of its political coverage.<sup>11</sup>

For guidance in resolving this question, the Administrative Law Judge has looked to case law developed under the Federal Election Campaign Act (FECA), which contains both a prohibition on the making or acceptance of certain types of corporate contributions or expenditures,<sup>12</sup> and a media exemption similar to Minn. Stat. § 211B.15, subd. 5. The federal statute excludes from the definition of "expenditure":

Any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.<sup>13</sup>

The approach taken by federal courts in applying the media exemption is that, in considering complaints relating to media entities, the initial inquiry is whether the media exemption applies to the communication at issue. Only if the media exemption does not apply is it appropriate to consider whether the communication fits within the otherwise broad definition of a "contribution" or "expenditure."<sup>14</sup> Structuring the inquiry to require some threshold showing of wrongdoing by the media entity serves the purpose of protecting the unique role of the press in informing and educating the public, offering criticism, and providing a forum for discussion and debate.<sup>15</sup>

In determining whether the media exemption applies, the focus is properly on whether the publisher was "acting as a press entity with respect to the conduct in question,"<sup>16</sup> or "acting in its capacity as a publisher,"<sup>17</sup> not on the

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<sup>10</sup> *Id.*, 239 N.W.2d at 902.

<sup>11</sup> See, e.g., *Savior v. McGuire*, 2002 WL 1906023 (D. Minn. Aug. 15, 2002), citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

<sup>12</sup> 2 U.S.C. § 441b(a).

<sup>13</sup> 2 U.S.C. § 431(9)(B)(i).

<sup>14</sup> *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981); *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308 (D.D.C. 1981).

<sup>15</sup> See *FEC v. Phillips Publishing*, 517 F. Supp. At 1314; see also *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (exclusion of the media from campaign finance regulations does not violate equal protection of the law).

<sup>16</sup> *Reader's Digest Ass'n*, 509 F. Supp. At 1215.

<sup>17</sup> *FEC v. Phillips*, 517 F. Supp. At 1313.

content of the communication at issue.<sup>18</sup> In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the Supreme Court concluded the media exemption was not applicable because the material at issue was not published through the facilities of the publisher's regular newsletter, was not distributed to the newsletter's regular audience, and did not contain the characteristics of the regularly published newsletter, such as the masthead or volume and issue number.<sup>19</sup>

In the case at hand, the Complainant does not dispute that PHMI was acting in its capacity as a publisher with regard to the five-page article published in the September 2008 issue of *Today*. In fact, the Complainant affirmatively alleges that PHMI is the publisher of a magazine and newsletter widely distributed in District 28A. The authorities cited above provide persuasive support for the conclusion that the media exemption in Minn. Stat. § 211B.15, subd. 5, is applicable here. The Complainant's evidence is insufficient to make even a threshold showing of wrongdoing by Respondent PHMI. The five-page article may not be considered a prohibited contribution as a matter of law.

### ***Advertisement***

With regard to the advertisement published in the October/November issue of the *Reporter*, the Complainant alleges that he believed the advertisement was published free of charge because it did not contain the words "PAID ADVERTISEMENT," as required by Minn. Stat. § 211B.05, subd. 1. Respondents have presented evidence that, despite the failure to use the required words, PHMI billed for the publication of this advertisement. They also presented evidence that Kelly/Kelly for House paid for the publication of the advertisement. Although the Complainant initially voiced no objection to receipt in evidence of the documents reflecting the invoice and payment, he argues that the documents may not be what they purport to be. Based upon the record developed during the probable cause hearing, it is apparent that the Complainant has come forward with insufficient evidence to proceed to hearing on the issue whether the advertisement was published free of charge, in violation of Minn. Stat. § 211B.15, subd. 2.

The claims that PHMI made a corporate contribution, in violation of Minn. Stat. § 211B.15, subd. 2, and that Tim Kelly and Kelly for House knowingly accepted or aided, abetted, or advised a prohibited contribution, in violation of Minn. Stat. §§ 211B.13, subd. 2, and 211B.15, subd. 13, are accordingly DISMISSED.

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<sup>18</sup> See *San Juan County v. No New Gas Tax*, 157 P.3d 831, 840-41 (Wash. 2007) (similar media exemption in Washington statute precludes considering the support of a radio talk-show host for a ballot initiative and political action committee to be a prohibited corporate contribution). In this well-reasoned decision, the Washington Supreme Court noted that the FEC has rejected a variety of complaints contending that various news entities acted as agents of candidates or political committees by presenting allegedly biased coverage. See *id.*, 157 P.3d at 831.

<sup>19</sup> 479 U.S. at 250-51.

The Respondents seek an award of attorney's fees and costs pursuant to Minn. Stat. § 211B.36, subd. 3, contending the Complaints are frivolous. The Complainant's assertion that the five-page article should be considered an advertisement published free of charge is arguably without foundation in the facts or law; but the claim that the one-page advertisement was published free of charge did have some factual basis, because of PHMI's failure to include the words "PAID ADVERTISEMENT." Because of this, the Administrative Law Judge declines to conclude that the Complaints as a whole are frivolous, and the request for attorney's fees and costs is DENIED.

K.D.S.